Supreme Court, U. S.
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In the Supreme Court of the United States

No. 78-793

PHILIP F. DiLEO,
Petitioner,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, FRED BETZ, SR., GERALDINE BEAN, DALE ATKINS, ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON, RAPHAEL J. MOSES, ROBERT M. GILBERT, and BYRON JOHNSON, as members of the Board of Regents of the University of Colorado, ROLAND C. RAUTENSTRAUS, President of the University of Colorado, COURTLAND H. PETERSON, Dean of the University of Colorado School of Law, JAMES N. CORBRIDGE, JR., Vice-Chancellor for the Academic Affairs and member of the Committee on Admissions, University of Colorado School of Law, ALEX KUO, Assistant Vice-Chancellor for Academic Affairs, University of Colorado, PEARL I. COLVIN, Assistant Dean for Admissions and Placement, University of Colorado School of Law, and WILLIAM E. RENTFRO, Director, Special Academic Assistance Program, University of Colorado School of Law,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ISSUES PRESENTED FOR REVIEW

Did the Colorado Supreme Court properly conclude that Petitioner (DiLeo) lacked standing to challenge the constitutionality of Respondents' (The Law School) group-oriented Special Academic Assistance Program (SAAP) when:

1. DiLeo admitted that absent consideration and admission through the SAAP, he was not academically qualified for admission to the Law School; and when
2. A determination that the group-based SAAP was unconstitutional would not provide DiLeo access to the educational benefits of admission to Respondents Law School; and when
3. The Colorado Supreme Court concluded that it lacked authority to revise or amend the SAAP and the likelihood of DiLeo being eligible for a new special program, if any, was speculative; and when
4. The likelihood of DiLeo being offered admission through the SAAP as presently constituted, even if eligible for consideration, was speculative and remote.

ARGUMENT IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

1. The Colorado Supreme Court Properly Concluded, Given the Circumstances of This Individual Action, That DiLeo Lacked Standing to Challenge the Constitutionality of Respondents' Special Academic Assistance Program (SAAP).

The decision below of the Colorado Supreme Court (Appendix A of Petition) affirmed the Trial Court's granting of summary judgment in favor of the Respondents herein (The Law School).

DiLeo had sought a ruling that the Law School's SAAP was unconstitutional by virtue of its use of race as a factor

of eligibility for consideration. The SAAP was, admittedly, a program designed to increase minority enrollment in the Law School. The pertinent provisions thereof read:

> "[A] program designed to identify prospective law students who appear to have the intellectual ability to graduate from this law school but would not otherwise be eligible for admission under normal admission standards, and who are members of *identifiable groups which have not had adequate educational and cultural opportunities available to them and which are seriously underrepresented in the legal profession.* It is understood that Negroes, Mexican-Americans and American Indians are such groups, members of which may be expected to constitute most, if not all, the participants in this program. It is not intended, however, to preclude participation by members of other identifiable groups which are shown to fit within the standards set forth in the first sentence of this subsection." (Emphasis added).

DiLeo claimed the SAAP was unconstitutional because he was not permitted, as an individual applicant, to compete for admission through the SAAP. Mr. DiLeo had been considered and denied admission in the normal process, both in 1973 and 1974. Mr. DiLeo admitted he did not academically qualify for regular admission. Absent some form of preferential admission program, which by its terms included him, DiLeo did not otherwise qualify for admission to the Law School.

The gravamen of DiLeo's claim was an attempt to have the Courts declare the group-based SAAP unconstitutional and allow him consideration for special admission as an alleged "disadvantaged individual" who had suffered inadequate cultural and educational opportunities and was, therefore, not qualified for admission under nor-

mal admissions criteria. He did not seek to have the Law School's SAAP eliminated as illegal, but redefined or reformed to include him as eligible for special consideration.

The Colorado Supreme Court concluded that it lacked authority to revise, reform or rewrite the Law School's SAAP into a new program.

> "It is not the proper function of a court to establish an admission program for a university, nor to rewrite the program according to its own notions." *DiLeo* v. *Board of Regents of the University of Colorado*, ... Colo. ....., ... P.2d .....

Thus, DiLeo's dilemma was that declaring the SAAP unconstitutional left him in the same position, to wit, not eligible for admission to Law School. Thus, he lacked standing under Colorado precedent because he could not benefit, in any way, from a ruling that the special admissions program, as constituted and administered, was unconstitutional. *Lee* v. *People*, 170 Colo. 268, 460 P.2d 796 (1969). Nor did the existence and operation of the SAAP adversely affect his position. Even if the spaces allocated to the SAAP were available, DiLeo would not receive the educational benefit of law school admission as he would admittedly fail in the competitive admissions process. The Colorado Supreme Court has consistently developed and applied the rule in Colorado that to have standing to challenge the constitutionality of state actions, a person must be adversely affected by the particular constitutional defect asserted. *People* v. *Stage*, ... Colo. ....., 575 P.2d 423 (1978); *Garcia* v. *City of Pueblo*, 176 Colo. 96, 489 P.2d 200 (1971); *People* v. *Stark and Peacock*, 157 Colo. 59, 400 P.2d 923 (1965); *McKinley* v. *Dunn*, 141 Colo. 487, 492, 349 P.2d 139, 142 (1960) and *Cross* v. *Bilett*, 122 Colo. 278, 221 P.2d 923.

Respondents submit these decisions are consonant with this Honorable Court's opinions on the question of standing and acceptance of review of this case is inappropriate.

DiLeo is not similarly situated to Alan Bakke who but for the existence of a special preferential admissions program would have been entitled to the educational benefit of admission to medical school. *The Regents of the University of California* v. *Bakke*, ... U.S. ....., 98 S.Ct. 2733, ... L.Ed.2d ..... (1978).

If the Colorado Supreme Court had addressed the viability of the SAAP in light of the *Bakke* decision and concluded its present administration and operation were illegal or unconstitutional, DiLeo's position would remain the same. Striking down the program leaves him still unqualified for admission.

At best, DiLeo might entertain the speculative hope that a favorable decision on the unconstitutionality of the SAAP would cause Respondents to enact a preferential program which by its terms allowed DiLeo's consideration. Thus, he is not in a position to demonstrate an injury to himself that is likely to be redressed by a favorable decision on his claim. *Warth* v. *Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The merits of the arguments regarding the constitutionality of the SAAP, vis-a-vis other applicants, is not a basis on which DiLeo's claim can rest. *Flast* v. *Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The Court's review of this program in substance produces no appreciable benefit to DiLeo.

Furthermore, the record at this stage indicates that the likelihood of DiLeo succeeding in admission, if eligible for the SAAP as presently constituted, is speculative. Assuming this group-based program were converted to a

program seeking "individually disadvantaged applicants," with no relation to legal representation or ethnic diversity, DiLeo's relative position vis-a-vis applicants admitted is less than hopeful. (See footnote 2 of Colorado Supreme Court Opinion, ... Colo. ....., ... P.2d .....)

Petitioner's protestations about his "personal stake" in the proceedings are also inapposite. Certainly he has made efforts through litigation to gain admission. And Respondents do not challenge his unabated desire to become an attorney. But these desires and personal feelings are not the underpinnings of standing as set forth in *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Nor does the lengthy history of litigation, the numerous motions and appeals create standing. The personal stake is whether a likelihood of a suffered injury being redressed is present. As indicated, no suffered injury exists and no relative change in access to educational benefits accrue from DiLeo's challenge to the SAAP. He is not an appropriate claimant to trigger a judicial review into the complex questions of the legality of Respondents' minority-based special academic assistance program.

CONCLUSION

The Petition for Writ of Certiorari should be Denied.

Respectfully submitted,

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